

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

LUIS ENRIQUE OVALLE MARQUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

2003 APR -7 AM 7:15
CLERK
U.S. DISTRICT COURT
OLD SAN JUAN, P.R.
CIVIL NO. 97-1571 (RLA)
[Cr. 91-397 (RLA)]

ORDER DENYING 28 U.S.C. § 2255 PETITION

Before the Court is LUIS OVALLE MARQUEZ'S Motion Pursuant to 28 U.S.C. § 2255 (docket No. 2) and an Amended Petition Under 28 U.S.C. §2255 (**docket No. 21**). Pursuant to the Court's orders, the United States responded to both. See docket Nos. 4 and 23.¹

BACKGROUND²

Special agents of the Drug Enforcement Administration ("DEA") were alerted to a drug trafficking operation in the Lajas/Cabo Rojo area of Puerto Rico by a paid government confidential informant, WILLIE LINDER, a German Citizen and fisherman who has lived in Puerto Rico since 1960.

¹ See also, Petitioner's Reply... (docket No. 6); Petitioner's Supplemental Reply... (docket No. 8); and Additional Evidence in Support... (docket No. 22) and Response [sic] to the Government's Opposition..., the filing of which is hereby **GRANTED**.

² This Background tracks the facts from the opinion issued by the Court of Appeals in United States v. Ovalle-Marquez, 36 F.3d 212 (1st Cir. 1994), cert. denied, 513 U.S. 1132 (1995).

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On November 27, 1991, LINDER met with OVALLE and co-defendants MIGUEL RIVERA SANTIAGO (RIVERA), SERGIO MONTEAGUDO-MARTINEZ (MONTEAGUDO),³ and HUMBERTO ARTUNDUAGA-ALVARADO (ARTUNDUAGA) in Las Cuebas, Puerto Rico. At this meeting, a plan was devised to import approximately 800 kilograms of cocaine (approximately 22 bales) to Puerto Rico by an airdrop of the narcotics in waters off the coast of the Dominican Republic. The meeting's participants planned to use two vessels to recover the narcotics--LINDER would captain his own boat, and MONTEAGUDO would captain the other boat. The vessels would depart from Puerto Rico for a location off the coast of Punta Espada, Dominican Republic, where they would load the cocaine onto the vessels with the help of some other individuals unknown to them. Tentatively, they scheduled the smuggling venture for sometime between December 8-13, 1991.

On November 29, 1991, OVALLE and ARTUNDUAGA delivered \$1000 to LINDER for the purpose of enabling LINDER to repair his boat. Thereafter, and up until December 9, OVALLE and ARTUNDUAGA met with LINDER occasionally to inquire about the status of the repairs, and to provide LINDER with additional money for its completion.

At some point in time it appears that defendants became suspicious of LINDER, and the defendants decided not to include LINDER in the smuggling operation planned for early December.

³ MONTEAGUDO entered into a plea agreement with the government and testified for the prosecution.

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3 Thereafter, on or about December 7, 1991, OVALLE, RIVERA and
4 MONTEAGUDO, as well as others, met to finalize the plans for the
5 smuggling operation, without LINDER's help. At the December 7
6 meeting, RIVERA gave MONTEAGUDO two firearms, a .38 caliber revolver
7 and a .22 caliber pistol. OVALLE loaded the firearms for MONTEAGUDO.

8 On December 9, 1991, after giving a pre-arranged signal to a
9 plane flying nearby, MONTEAGUDO, co-defendant SANTOS VICTOR CHALA-
10 RAMOS (CHALA), and two other men from the Dominican Republic, picked
11 up 21 bales, containing approximately 800 kilograms of cocaine, off
12 the coast of Santo Domingo, Dominican Republic. MONTEAGUDO decided
13 to leave in one boat with 11 bales of cocaine, and leave 10 bales of
14 cocaine hidden on a nearby beach because one of the boats that
15 MONTEAGUDO had planned to use to pick up the cocaine was damaged.
16 The remaining bales of cocaine were left guarded by the two-man crew
17 of the damaged boat.

18 On December 11, 1991, MONTEAGUDO and the other Dominican man on
19 board (known to MONTEAGUDO as QUEQUE), proceeded to import 11 of the
20 21 bales of cocaine into Puerto Rico. However, in an attempt to halt
21 a pursuit by unknown persons and minimize the loss of the entire
22 load, he was forced to throw seven bales into the seas. MONTEAGUDO
23 eventually delivered the remaining four bales to OVALLE and RIVERA.

24 The defendants then agreed to recover the rest of the cocaine
25 that had been left behind in the Dominican Republic. On December 12,
26 OVALLE and RIVERA met with LINDER to survey various coastline areas,

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2 including Playita Rosada in La Parguera, Puerto Rico for possible
3 landing sites to recover the remaining bales of cocaine.

4 On December 13, OVALLE, RIVERA and ARTUNDUAGA visited LINDER at
5 his home to obtain his help in recovering the other ten bales of
6 cocaine. LINDER was instructed to meet with OVALLE in Ponce for
7 further instructions. LINDER then met with OVALLE and another man as
8 arranged. The men then went to RIVERA's home where LINDER left his
9 car. RIVERA, OVALLE, LINDER and the other man then proceeded to a
10 pier in Ponce. MONTEAGUDO met them at the pier, and MONTEAGUDO and
11 LINDER then departed in a boat for Lajas, Puerto Rico. It was
12 sometime during the day that LINDER contacted DEA agents and advised
13 them of defendants' planned venture.

14 On December 14, MONTEAGUDO and LINDER departed Puerto Rico
15 towards the area of Saona, Dominican Republic, where they were
16 assisted by several Dominican men in the loading of the remaining ten
17 bales of cocaine (372 kilograms). Then, on December 15, MONTEAGUDO
18 and LINDER returned to Playita Rosada, where DEA agents seized the
19 cocaine and arrested MONTEAGUDO. DEA agents subsequently arrested
20 OVALLE and RIVERA.

21 **PROCEDURAL BACKGROUND**

22 On June 3, 1992, a grand jury returned a second superseding
23 seven count indictment against OVALLE and eight other defendants.
24 **Counts One and Two** of the indictment charged the defendants with
25 conspiring to import, and conspiring to possess with the intent to
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2 distribute, approximately 800 kilograms of cocaine from November 27
3 to December 17, 1991, in violation of 21 U.S.C. §§ 841(a)(1), 846,
4 952(a) and 963. **Count Three** charged the defendants with aiding and
5 abetting the importation of approximately 418 kilograms of cocaine on
6 December 11, 1991, in violation of 21 U.S.C. § 952(a) and 18 U.S.C.
7 § 2. **Count Four** charged the defendants with aiding and abetting the
8 possession with intent to distribute approximately 150 kilograms of
9 cocaine on December 11, 1991, in violation of 21 U.S.C. § 841(a)(1)
10 and 18 U.S.C. § 2. **Counts Five and Six** charged the defendants with
11 aiding and abetting the importation, and possession with intent to
12 distribute, 372 kilograms of cocaine on December 15, 1991, in
13 violation of 21 U.S.C. § 841(a)(1) and 952(a), and 18 U.S.C. § 2.
14 **Count Seven** charged the defendants with aiding and abetting the use
15 and carrying of firearms in relation to a drug offense, in violation
16 of 18 U.S.C. § 924(c)(1).

17
18 Trial commenced on August 25, 1992, and the jury returned guilty
19 verdicts against OVALLE on Counts One, Two, Five and Six. The jury
20 acquitted all of the defendants, including OVALLE, of the charges in
21 Counts Three, Four and Seven.

22 At a sentencing hearing on January 22, 1993, the Court
23 determined that OVALLE's total offense level was 46, and that his
24 Criminal History Category was I, which mandated a sentencing
25 guideline range of life imprisonment. OVALLE was then sentenced to
26 four concurrent sentences of life imprisonment.

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3 Appeal

4 On appeal, OVALLE challenged his conviction and sentence by
5 raising the following claims:

- 6 1) Court's failure to make sentencing findings;
- 7 2) improper limits on cross-examination;
- 8 3) prosecutorial misconduct;
- 9 4) firearm enhancement;
- 10 5) supervisory and managerial role enhancement; and
- 11 6) erroneous findings regarding quantity of drugs.

12 All issues were decided on the merits and the conviction was
13 affirmed. See United States v. Ovalle-Marquez, 36 F.3d 212 (1st Cir.
14 1994), cert. denied, 513 U.S. 1132 (1995).

15 Original 28 U.S.C. § 2255 Petition

16 In his original § 2255 petition, OVALLE raised the following
17 claims of constitutional error:

- 18 1) ineffective assistance of counsel, including a conflict of
19 interest among counsel, refusal to allow the defendant to testify on
20 his own behalf, and ineffective assistance at sentencing;
- 21 2) improper and arbitrary limitation on cross-examination of
22 witnesses;
- 23 3) illegal enhancement for role in the offense;
- 24 4) erroneous enhancement for possession of firearm;
- 25 5) failure to instruct the jury on specific issues;
- 26 6) duplicity of the indictment; and

7) retroactive application of Sentencing Guidelines Amendment 505 to Section 2D1.1(c).

Amended Petition

OVALLE's Amended §2255 petition, filed after the Court granted his request for appointment of counsel, alleged the following claims:

A) Ineffective assistance of counsel, which incorporated the following:

1. failure of counsel to call witnesses in his favor and to allow petitioner to testify;

2. failure to challenge the role in the offense;

3. failure to raise the attorney-client privilege to prohibit the cooperating co-defendant from testifying about information allegedly acquired during the joint defense meetings;

4. failure to move to suppress testimony in violation of 18 U.S.C. § 201(c);

5. outrageous government conduct--failure to move to suppress the testimony of the confidential informant; and

B) Retroactive application of Sentencing Guidelines Amendment 505.

DISCUSSION

Issues disposed of on appeal

Issues disposed of in a prior appeal cannot be re-litigated by way of a 28 U.S.C. § 2255 motion. Murchu v. United States, 926 F.2d

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50, 55 (1st Cir. 1991), Singleton v. United States, 26 F.3d 233, 240 (1st Cir. 1994), cert. denied, 115 S.Ct. 517 (1994).

Issues No. 2-4 of OVALLE'S original §2255 petition, which were fully litigated and rejected in his direct appeal, cannot now be raised by way of a collateral attack on his sentence. Accordingly, they are hereby DENIED.

Issues not raised on appeal

The Supreme Court has repeatedly emphasized that § 2255 is not a substitute for direct appeal. See e.g., United States v. Frady, 456 U.S. 152, 165, 102 S.Ct. 1584, 1593, 71 L.Ed.2d 816 (1982); McCleskey v. Zant, 499 U.S. 467 (1991). Therefore, non-constitutional claims that could have been, but were not, raised on appeal, may not be asserted by collateral attack pursuant to § 2255, absent exceptional circumstances. See Stone v. Powell, 428 U.S. 465, 477 n.10 (1976).

We find that OVALLE's claims that the indictment was duplicitous and the Court failed to instruct the jury as he requested (issues 5 and 6 of the original petition) fall far short of the "exceptional circumstances" standard enunciated by the Supreme Court. Neither claim is based on exceptional circumstances. Rather, each alleges ordinary errors that could and should have been raised by OVALLE on direct appeal. Furthermore, even assuming error was committed, the errors would not amount to the "complete miscarriage of justice" standard established by the Supreme Court for claims that do not

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allege jurisdictional or constitutional errors. See, e.g., Hill v. United States, 368 U.S. 424, 428, 82 S.Ct. 468, 471 (1962).

Having ignored his opportunity to raise these claims on direct appeal, OVALLE cannot now raise them in a collateral attack. Accordingly, these two claims are DENIED. Singleton, 26 F.3d at 240.

Ovalle's Ineffective Assistance of Counsel Claims

The Sixth Amendment of the U.S. Constitution guarantees criminal defendants the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); Lema v. United States, 987 F.2d 48, 51 (1st Cir.1993). This right does not require either a "letter-perfect" or successful defense. United States v. Natanel, 938 F.2d 302, 309-10 (1st Cir. 1991), cert. denied 502 U.S. 1079 (1992).

In order to prevail on a Sixth Amendment claim, a defendant must satisfy the two prongs set forth in Strickland. These are: (1) that counsel's representation fell below an objective standard of reasonableness; and (2) that prejudice resulted. Matthews v. Rakiey, 54 F.3d 908, 916 (1st Cir. 1995) (citing Strickland, at 694, 104 S.Ct. at 2068).

As to the first prong, the yardstick is whether counsel has brought to "bear such skills and knowledge as will render the trial as a reliable adversarial process." Scarpa v. Dubois, 38 F.3d 1, 8 (1st Cir. 1994) (citing Strickland, at 687, 104 S.Ct. at 2064). Thus, the proper measure of attorney performance remains simply

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reasonableness under the prevailing professional norms taking also into consideration the totality of circumstances. Id. The evaluation as to this prong demands a fairly tolerant approach. Specifically, Strickland provides that judicial scrutiny of counsel's performance must be highly deferential because it is all too tempting for a defendant to second guess counsel's assistance after conviction and adverse sentence. Furthermore, the difficulties inherent in making the evaluation create a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance; that is, a defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." Strickland, at 689, 104 S.Ct. at 2065.

In conclusion, a petitioner bears an extremely heavy burden. The Court must evaluate the challenged conduct from counsel's perspective at the time, considering the totality of the circumstances before it, and making every effort to eliminate the distorting effects of hindsight.

As to the second prong, petitioner must have suffered actual prejudice as a result of counsel's decision. Strickland, at 693. This "prejudice" element also presents a high hurdle to overcome. Argencourt v. United States, 78 F.3d 14, 16 (1st Cir. 1996). Even if counsel's error is perceived as professionally unreasonable, that by itself does not warrant setting aside the judgment. The defendant must show that the error actually had an adverse effect on the final

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3 outcome of the trial. That is, he must affirmatively show that, but
4 for counsel's unprofessional errors, the result of the proceeding
5 would have been different. Strickland at 691-94.

6 The Court of Appeals for the First Circuit has established that
7 a petitioner bears a very heavy burden on an ineffective assistance
8 claim. "The habeas court must evaluate the [challenged] conduct from
9 counsel's perspective at the time, considering the totality of the
10 circumstances before it, and making every effort... to eliminate the
11 distorting effects of hindsight." Lema, 987 F.2d at 51 (internal
12 citations omitted).

13 A review of petitioner's claims and the criminal record of this
14 case readily demonstrates that petitioner's list of counsel's alleged
15 failures is unsubstantiated.

16 OVALLE asserts in his amended 2255 petition that his counsel
17 provided ineffective assistance because he allegedly failed to:
18 1) call witnesses in his favor or allow him to testify in his own
19 behalf; 2) challenge the role in the offense; 3) raise the attorney-
20 client privilege to stop the cooperating witness from testifying
21 about information acquired by the joint defense meetings and/or
22 agreement; 4) move to suppress the testimony of the cooperating
23 witness for having been obtained in violation of 18 U.S.C. Section
24 201(c); and 5) move to suppress the testimony of the confidential
25 informant pursuant to an outrageous government conduct defense.
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3 1. Alleged failure to call witnesses in Ovalle's favor and to
4 allow him to testify in his own behalf.

5 OVALLE claims in his amended 2255 petition that he informed
6 counsel of his desire to testify in his own behalf and that his
7 counsel allegedly denied him that right because petitioner did not
8 know English and the prosecutor could allegedly confuse him during
9 cross-examination.

10 Yet, there is a presumption that OVALLE's counsel decision to
11 recommend him not to testify on his own behalf was made by the trial
12 counsel as part of his case strategy at the time of trial. The
13 reasonableness of counsel's challenged conduct should be judged upon
14 the facts of this particular case, "viewed as of the time of
15 counsel's conduct." Strickland, 466 U.S. 690. The precise basis or
16 bases for the trial counsel's strategy at that moment are presumed to
17 be reasonable and deference should be granted to counsel's judgment.
18 Thus, OVALLE fails to rebut the strong presumption that counsel's
19 conduct falls within a wide range of reasonable professional
20 assistance and that, under the circumstances, the challenged action
21 'might be considered sound trial strategy.' Lema 987 F.2d at 51.

22 Second, OVALLE failed to show any prejudice suffered by him
23 because of his counsel's failure to allow him to testify in his own
24 behalf. OVALLE mentioned in his 2255 petition, without more, that
25 his testimony would have contradicted the testimony of the
26 cooperating witnesses and the confidential informant. Nonetheless,

petitioner fails to explain the grounds for his contention and the prejudice he suffered. "Some greater particularity is necessary ...to give the claim sufficient credibility to warrant a further investment of judicial resources in determining the truth of the claim." Underwood v. Clark, 939 F.2d 473, 476 (7th Cir. 1991).

Third, the government's strong evidence against OVALLE and the other co-defendants outweighed the value of his potential testimony in light of the totality of the circumstances and the case strategy.

OVALLE also asserts that his counsel failed to call several friends from Colombia who were willing to testify on his behalf. The decision not to call these witnesses was also made by OVALLE's counsel as a "tactical" decision. These witnesses, friends and family members of OVALLE, would have offered cumulative reputation testimony. In light of the circumstances surrounding the case and the counsel's own defense strategy, OVALLE's attorney decided not to call them. See e.g. Lema, 987 F.2d at 55 ("the decision to interview potential witnesses, like the decision to present their testimony, must be evaluated in light of whatever trial strategy reasonably competent counsel devised in the context of the particular case").

In any event, OVALLE has failed to show any prejudice to him caused by his counsel's alleged failure to call these witnesses. Furthermore, the government's strong evidence against petitioner weakens, if not eliminates, any claim of prejudice.

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3 **2. Alleged failure to challenge role in the offense**

4 OVALLE claims that his counsel failed to challenge the
5 enhancement for role in the offense which was included in the Pre-
6 Sentence Report (PSR).

7 OVALLE claims that his attorney failed to raise his objections
8 to the PSR in the manner required by District Court of Puerto Rico
9 Local Rule 418, because his attorney only submitted his objections to
10 the probation officer and failed to submit his objections to the
11 court. The record shows, however, that OVALLE was afforded an
12 opportunity at the sentencing hearing to advance his objections to
13 the PSR and the Court of Appeals so acknowledged in its opinion. See
14 Ovalle, 36 F.3d at 228, note 10. Thus, OVALLE's counsel did, in
15 fact, challenge the role in the offense at the sentencing hearing.

16 In light of the foregoing, OVALLE has failed to show that his
17 counsel incurred in ineffective assistance of counsel in this issue.

18 **3. Alleged failure to raise attorney-client privilege**

19 OVALLE states in his amended 2255 petition that in this case
20 there was an alleged joint defense agreement and numerous joint
21 meetings where defense strategy was discussed at which government
22 witness SERGIO MONTEAGUDO was present. OVALLE implies that
23 MONTEAGUDO disclosed defense strategy to the government and breached
24 the joint defense agreement. In essence, OVALLE contends that even
25 though his counsel was aware of the joint defense agreement, he never
26 raised its existence to this Court in order to impede the testimony

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2 of MONTEAGUDO given at trial in violation of the agreement.
3 Furthermore, OVALLE avers that his counsel incurred in ineffective
4 assistance of counsel because he never raised the attorney-client
5 privilege which allegedly would have protected the communications
6 between the co-defendants and MONTEAGUDO.
7

8 "The joint defense privilege" is an extension of the attorney
9 client privilege.'" United States v. Bay State Ambulance, 874 F.2d
10 20, 28 (1st Cir. 1989) (quoting Waller v. Financial Corp. of America,
11 828 F.2d 579, 583, n.7 (9th Cir. 1987)). "The joint defense privilege
12 protects communications between an individual and an attorney for
13 another when the communications are 'part of an on-going and joint
14 effort to set up a common defense strategy.' In Re Bevill, Bresler &
15 Schulman Asset Management Corp., 805 F.2d 120, 126 (3d Cir. 1986)
16 (citation omitted). "Communications to an attorney to establish a
17 common defense strategy are privileged even though the attorney
18 represents another client with some adverse interests." Eisenberg v.
19 Gagnon, 766 F.2d 770, 787-88 (3d Cir.), cert. denied, 474 U.S. 946,
20 106 S.Ct. 342, 343, 88 L.Ed.2d 290 (1985); see also United States v.
21 McPartlin, 595 F.2d 1321, 1336 (7th Cir.) Cert. denied, 444 U.S. 833,
22 100 S.Ct. 65, 62 L.Ed.2d 43 (1979). To qualify for the privilege,
23 the communication must have been made in confidence. See United
24 States v. Keplinger, 776 F.2d 678, 701 (7th Cir. 1985), cert. denied
25 476 U.S. 1183 (1986).
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3 First of all, OVALLE has failed to prove that a joint defense
4 privilege existed. OVALLE states in his amended 2255 petition and
5 affidavit that there was a joint defense effort between the co-
6 defendants and their attorneys, claiming the agreement was verbal and
7 existed since the beginning of the case. However, OVALLE fails to
8 provide any evidence to establish that the communications allegedly
9 made during any meetings were made in the course of a joint defense
10 effort, or that the privilege has not been waived. OVALLE makes
11 reference only to various meetings that were held among various co-
12 defendants and their attorneys in which it was agreed that if a co-
13 defendant decided to cooperate with the government, the attorney
14 would so inform the others and withdraw.

15 More importantly, OVALLE has failed to present any evidence to
16 show what information was allegedly divulged by MONTEAGUDO to the
17 government and, if the information had been obtained by MONTEAGUDO at
18 the meetings, how this purported information prejudiced his defense.
19 In fact, OVALLE admits not knowing if the alleged information passed
20 along by MONTEAGUDO to the government was used at trial. Therefore,
21 as indicated, no prejudice has been shown.

22 In addition, OVALLE accuses his counsel of not invoking the
23 attorney-client privilege in order to prevent MONTEAGUDO from
24 testifying at trial in violation of the privilege. However, since
25 the existence of the alleged joint defense privilege had not been
26 proven, OVALLE's counsel could be under no obligation to invoke the

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2 attorney-client privilege. More so, even if the joint defense
3 privilege had existed, OVALLE, likewise, fails to demonstrate that
4 his counsel had knowledge that the information MONTEAGUDO provided at
5 trial was obtained by him in breach of such an agreement.
6

7 Furthermore, the decision not to invoke the attorney-client
8 privilege was made by the trial counsel as part of his case strategy
9 at the time of trial. The reasonableness of counsel's challenged
10 conduct should be judged upon the facts of this particular case,
11 "viewed as of the time of counsel's conduct." Strickland, 466 U.S.
12 690. The bases for the trial counsel's strategy at that moment are
13 unknown to us but they are presumed to be reasonable and deference
14 should be granted to counsel's judgments. Therefore, OVALLE has once
15 again failed to rebut the strong presumption that counsel's conduct
16 falls within a wide range of reasonable professional assistance and
17 that, under the circumstances, the challenged action 'might be
18 considered sound trial strategy.' Lema, 987 F.2d at 51.

19 Thus, OVALLE's claim is unsupported, and is hereby **DENIED**.

20 4. Alleged failure to suppress testimony in violation of 18
U.S.C. § 201(c)(2)

21 OVALLE contends that the Government obtained the testimonies of
22 a confidential informant and a cooperating codefendant in violation
23 of 18 U.S.C. § 201(c)(2). To that effect, OVALLE argues that his
24 attorney should have moved to suppress the testimony of these
25 witnesses pursuant to the ruling of the Tenth Circuit Court of
26 Appeals in United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998).

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3 Although also acknowledging that the Singleton case is no longer
4 applicable, OVALLE argues that "the prohibition of Section 201(c)(2)
5 has not been repealed by Congress and is still subject to
6 interpretation by the courts and enforcement accordingly."

7

8 In fact, the interpretation of the First Circuit Court of
9 Appeals was not to be delayed:

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11 Singleton I appears to us to be nothing more
12 than an aberration, and we reject its reasoning
13 and result. We use the term "aberration"
14 advisedly, because the opinion has been
15 overruled in the circuit of its birth, and
16 several other courts of appeals have disavowed
17 its anfractuous reading of section 201(c)(2).
18 Today, we make our position explicit and
19 unqualified[:]

20

21 ...

22 We hold, without serious question, that 18
23 U.S.C. § 201(c)(2) does not bar the government
24 from promising leniency or the like to
25 cooperating witnesses.

26 United States v. Lara, 181 F.3d 183, 197-198 (1st Cir. 1999) (internal
27 citations omitted).

28 Finally, OVALLE's attempt to invoke this witness-bribery statute
29 is in vain. While the testimony of cooperating witnesses must always
30 be scrutinized with care, the witnesses here were subjected to
31 examination by several sets of defense counsel and the jury was

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3 properly instructed to weigh their testimony in light of the promises
4 made and the inducements offered. See e.g., United States v. Franky-
5 Ortiz, 230 F.3d 405, 407 (1st Cir. 2000).

6 Accordingly, OVALLE's claim in this regard must also be DENIED.

7 **5. Alleged outrageous Government Conduct**

8 OVALLE claims that his attorney incurred in ineffective
9 assistance of counsel because he failed to secure the records of
10 government payments to the confidential informant which was
11 discoverable evidence, in order to elicit the defense of outrageous
12 government conduct. OVALLE's claim is unsupported. No one knows if
13 his attorney attempted to obtain such record from the government but
14 was somehow unsuccessful. Furthermore, OVALLE's counsel could have
15 decided not to obtain the records as part of his trial strategy. In
16 this regard, "[our] scrutiny of the attorney's performance must be
17 highly deferential." Negron v. U.S., 175 F.Supp.2d 148, 152 (D.P.R.
18 2001) (citing Strickland, 466 U.S. at 689, 104 S.Ct. 2052). A court
19 must evaluate the challenged conduct of the attorney not with the
20 benefit of hindsight, but from the attorney's perspective at the time
21 of trial. Strickland, 466 U.S. at 689, 104 S.Ct. 2052.

22 OVALLE has again failed to rebut the strong presumption that his
23 attorney's conduct fell within a wide range of reasonable
24 professional assistance. Furthermore, he failed to show that there
25 is a reasonable probability that, but for his counsel's deficient
26 performance, the outcome would have been different. Strickland 466

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U.S. at 694. Given the weight of the Government's evidence at trial, we fail to see how this impeachment evidence against the informant could have yielded a different result at trial.

Accordingly, this claim is also DENIED.

Retroactive Application of Amendment 505
of Sentencing Guidelines

OVALLE alleges that he should be resentenced under 18 U.S.C. § 3582(c)(2) pursuant to Amendment 505⁴ to Section 2D1.1 of the United States Sentencing Guidelines, which lowered the upper limit of the Drug Quantity Table to 38 and was made retroactive pursuant to Sentencing Guidelines Section 1B1.10(c).

Unfortunately for OVALLE, even if the Amendment were to be applied, he would still face a sentencing guideline range of life imprisonment. Using a base offense level of 38 pursuant to Amendment 505, in substitution of the base offense level of 40 applied at his sentencing, and adding the 2-point enhancement for possession of the firearms; and the 4-point enhancement for role in the offense;⁵ would render an offense level of 44 for OVALLE. Combining his Criminal History Category of I, OVALLE's offense level of 44 would still call for a term of life imprisonment.

Accordingly, because the retroactive application would not produce a reduction in OVALLE'S sentence in any case, this claim is also DENIED.

⁴ Amendment 505 became effective on November 1, 1994.

⁵ The application of both of these enhancements was affirmed on appeal. See Ovalle, 36 F.3d at 228-229.

Claim that Petitioner's Sentence is in Violation of
Apprendi v. New Jersey

By way of a series of supplemental pleadings,⁶ OVALLE avers that the Court erred in sentencing him pursuant to the rule enunciated in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The rule in Apprendi is that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Petitioner claims that he "received a sentence five (5) years longer than the maximum he could have received had he been sentenced on the facts as found by the jury."

Apprendi was decided after OVALLE filed the present petition. The First Circuit has not directly addressed the question of whether Apprendi applies retroactively. However, the general consensus of several other circuits is that Apprendi does not apply retroactively to cases on collateral review. See Negron v. U.S., 175 F.Supp.2d 148 (D.P.R. 2001) (citing U.S. v. Moss, 252 F.3d 993 (8th Cir. 2001); McCoy v. U.S., 266 F.3d 1245 (11th Cir. 2001); Forbes v. U.S., 262 F.3d 143 (2nd Cir. 2001); U.S. v. Sanders, 247 F.3d 139 (4th Cir. 2001)). This Court will not depart from the opinions in these cases,

⁶ See Supplemental Motion in Support to [sic] Motion to Vacate Sentence (**docket No. 28**); United States of America's Response... (**docket No. 31**); and Petitioner's Reply... (**docket No. 33**). See also Additional Motion in Support of Pending 2255 Petition (**docket No. 39**) and Supplemental Memorandum of Law in Support of 2255 Petition (**docket No. 40**).

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and will not, therefore, apply Apprendi retroactively. Accordingly, this claim must also be DISMISSED.

Motion for Downward Departure

Finally, OVALLE urges us to consider his extraordinary efforts at rehabilitation and depart downward at the time of his resentencing if he proves "successful on the Apprendi issue".⁷

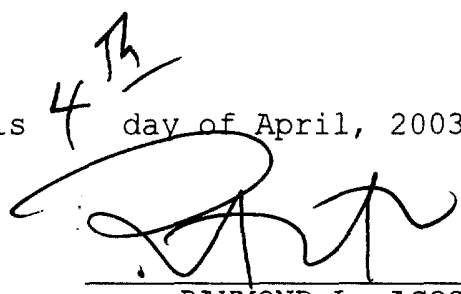
Since the Court has declined to apply Apprendi retroactively, this request is DENIED as moot.⁸

Having denied all of OVALLE's claims, his petition for post-conviction relief under 28 U.S.C. § 2255 is hereby **DISMISSED**.⁹

Judgment to be entered accordingly.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 4th day of April, 2003.


RAYMOND L. ACOSTA
United States District Judge

⁷ See Motion for Downward departure pursuant to U.S.S.G. § 5K2.0, with Incorporated Memorandum of Law in Support, (docket No. 34).

⁸ Defendant's Motion for Immediate Deportation is likewise **DENIED**. See docket No. 311 in Criminal Case No. 91-159 (RLA).

⁹ Petitioner's Motion for Evidentiary Hearing (docket No. 24) is **DENIED**. A habeas petitioner is not automatically entitled to a hearing, Machibroda v. United States, 368 U.S. 487 (1962), and the court, by its own action or by requiring a response from the government, may be able to gain sufficient information to dispose of appellant's allegations without a hearing. Hart v. United States 565 F.2d 360, 362 (1st Cir. 1978).